76-11

IN THE

Supreme Court of the United States

October Term, 1975

No. .....

DAVID HALL,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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5. The district court refused to examine prospective jurors who had heard or read pretrial news accounts of the charges against petitioner, with particularity to elicit answers which would be a basis for objectively determining the impact, if any, of such news accounts on the jurors' impartiality. The district court was content to rely on the jurors' subjective responses to general questions, to the effect that they had not formed opinions as to petitioner's guilt in consequence of having read or heard such news accounts, and that they could put aside any information they had gotten from such news accounts, etc. Petitioner is a well known public figure in Oklahoma, and pretrial news accounts of the case were read or heard by all proposed jurors who were examined. The nature of the news accounts was such that 4, or possibly 5, of the approximately 31 jurors examined admitted that they had formed opinions as a result of reading or hearing them. In affirming, the court below decided an important question of federal law which has not been, but should be, settled by this Court 42

6. Petitioner and a witness against him called by the prosecutor had been charged by the Grand Jury as co-defendants in the conspiracy count —Count II—of the indictment. On direct examination of the witness, the prosecutor elicited that fact, and also the fact that prior to trial the witness had pleaded guilty to Count II. On his cross-examination of petitioner, the prosecutor dwelt at length on the plea of guilty of such witness, the circumstances surrounding it and its consequences to the wit-

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The petitioner, David Hall, defendant-appellant in the proceeding below, prays that a writ of certiorari issue to review the judgment therein of the United States Court of Appeals for the Tenth Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, is set out at App. A, pp. 1a-35a, *infra*.[1] The orders of the United States District Court for the Western District of Oklahoma, dated and filed February 11, 1975, and April 24, 1975, are set out, respectively, at App. C, pp. 38a-63a and App. D, pp. 64a-74a, *infra*.

Jurisdiction

The judgment (order) of the United States Court of Appeals for the Tenth Circuit affirming the judgment of conviction of the United States District Court for the Western District of Oklahoma, App. F, p. 86a, *infra;* R. III-607, is dated and was entered May 12, 1976. Petitioner's timely petition for rehearing was denied by order of the United States Court of Appeals, dated and entered June 8, 1976. App. B, pp. 36a-37a, *infra*. The jurisdiction of the United States District Court for the Western District of Oklahoma was based on Tit. 18 U.S.C. §3231. The jurisdiction of this Court is invoked under Tit. 28 U.S.C. §1254(1).

Questions Presented

The questions presented for review are:

1. Whether the solicitation by a State officer of a payment for the performance of a service constitutes attempted extortion induced under color of official right with-

1. App. references are to appendices to this petition. R. references are to the volume (Roman numerals) and page (Arabic numerals) of the record in the court below.

in the meaning of the Hobbs Act, Tit. 18 U.S.C. §1951, *where* the service was not within the scope of his official duties and the payment was neither due to him, nor represented by him to be due to him, by law, for any official service.

2. Whether petitioner is denied his Fifth Amendment right not to be tried for felony except on the presentment or indictment of a grand jury, *where* in an indictment charging him with conspiracy to violate, and violating the Travel Act, Tit. 18 U.S.C. §1952, the grand jury charged that the "unlawful activity" comprised two offenses under State law, but, the district court, holding *sua sponte* that the averments of the second of such alleged offenses were surplusage, "out of an abundance of caution, fearful that this could be some measure of inconsistency", amended the indictment, in legal effect, by directing that the trial be conducted, and conducting it in all respects as though there were no such averments in the indictment.

3. Whether petitioner is denied his Sixth Amendment right to a trial by an impartial jury in the absence of a showing that the consideration of the case by a 65-year-old juror was not affected by drugs taken by, and/or administered to her when she became ill after the jury had been instructed and sequestered for the duration of its deliberations, and, further, by *ex parte* telephone communications by the trial judge with her physician, and through him with the juror, while she was hospitalized, *where* the trial judge told the juror's physician that he "would like to finish" the case "today", the juror thereupon returned to the jury's deliberations, and the jury

reached a verdict less than three hours later, notwithstanding its inability to reach a verdict in approximately a day and a half before she was taken ill.

4. Whether petitioner is denied his right under Rule 43(a) of the Federal Rules of Criminal Procedure to be present at every stage of the trial, by the *ex parte* communications of the trial judge with the juror's physician, and through him with the juror, mentioned in "3" above.

5. Whether petitioner is denied his Sixth Amendment right to trial by an impartial jury by the refusal of the district court to examine individually each perspective juror who admitted having read or heard pretrial news accounts of the charges against petitioner, with particularity to elicit answers which would be a basis for an objective determination of the effect thereof, if any, on such perspective juror's ability to be impartial, *where* petitioner is a public figure, such pretrial news accounts were extensive and all of the perspective jurors who were examined admitted to having read or heard such news accounts.

6. Whether petitioner is denied his Fifth Amendment right to a fair trial, *where* the fact that a witness against him was a co-defendant who had pleaded guilty is put in evidence by the prosecutor, petitioner is cross-examined at some length by the prosecutor with respect to such co-defendant's plea of guilty, and in his summation the prosecutor dwells on such co-defendant's plea of guilty, and the consequences of it to him, as assuring his veracity as a witness.

The Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the Fifth and Sixth Amendments, which are set out at App. E, p. 75a, *infra*.

The statutes involved are the Hobbs Act, Tit. 18 U.S.C. §1951 and the Travel Act, Tit. 18 U.S.C. §1952, which are set out at App. E, pp. 75a-77a, *infra*.

The rules involved are Rules 7 and 43 of the Federal Rules of Criminal Procedure, which are set out at App. E, pp. 78a-81a, *infra*.

Also involved are §§850-859 of the New York Penal Law of 1909, which are set out at App. E, pp. 81a-85a, *infra*.

Statement of the Case

In a six-count indictment filed January 16, 1975, R. I-1, the Grand Jury of the United States for the Western District of Oklahoma charged petitioner in Count I, R. I-1, with violating the Hobbs Act, Tit. 18 U.S.C. §1951; charged the petitioner and others in Count II, R. I-3, with conspiracy to violate the Travel Act, Tit. 18 U.S.C. §1952; charged petitioner in each of Counts III and IV, R. I-6, 7, with a violation of the Travel Act, Tit. 18 U.S.C. §1952; and in Counts V and VI, R. I-7, 8, charged others than petitioner with two violations of the Travel Act, Tit. 18 U.S.C. §1952. Petitioner pleaded not guilty, the case was tried to a jury,

and petitioner was found guilty on all Counts, as charged. The district court denied petitioner's post-verdict motions for judgment notwithstanding the verdict or, alternatively, for a new trial, and the Court of Appeals affirmed the judgment of conviction. App. C, pp. 38a-63a; App. A, pp. 1a-35a, *infra*.

The gist of the alleged factual background of all four charges against petitioner is that, when he was Governor of Oklahoma, he solicited money from a corporation and/or persons connected with it, to exert influence on the Board of Trustees of Oklahoma's public employees' retirement system to invest funds of the system with such corporation. Petitioner was not a member of such Board of Trustees, and participation in its investment decisions was not within the scope of his official duties.

This is the framework on which Count I charges petitioner with attempted extortion "under color of official right", in violation of the Hobbs Act; Count II charges him with participation in a conspiracy to violate the Travel Act by promoting a scheme to bribe a public officer or public officers of the State of Oklahoma, and to accept a bribe, in violation of Oklahoma law; and Counts III and IV each charge him with the promotion of a scheme, in violation of the Travel Act, to bribe one Rogers, a public officer of the State of Oklahoma, and to accept a bribe himself, in violation of Oklahoma law.

The facts pertinent to the three disparate aspects of the case with which this petition is concerned, are set out in the discussion which follows.

Reasons for Granting the Writ

1. *In indicting petitioner for violating the Hobbs Act, Tit. 18 U.S.C. §1951, the Grand Jury charged that he solicited money "under color of official right" to influence an investment decision of the Board of Trustees of the Oklahoma public employees' retirement system. Petitioner was not a member of such Board, and participation in its investment decisions was not within the scope of his official duties. In nevertheless affirming petitioner's conviction, the court below decided an important question of federal law which has not been, but should be, settled by this Court.*

In charging petitioner with a violation of the Hobbs Act, the Grand Jury charged, R. I-1, 2, 3, that petitioner, when Governor of Oklahoma, attempted to obtain money from a corporation and/or persons connected with it

> induced under color of official right, that is to say to obtain money by virtue of the defendant's [*i.e.*, petitioner's] position as Governor of Oklahoma, in that the defendant used the power, influence, prerogatives and prestige of his office to influence

the Board of Trustees of the public employees' retirement system to make an investment with such corporation. It affirmatively appears from the indictment that petitioner was not a member of the Board, and there is no allegation, nor has the prosecution contended (as, indeed, it could not) that superintendence over the Board in the conduct of its affairs generally or that participation in its decisions concerning the investment of the system's funds was, by virtue of his being Governor, or otherwise, within the scope of

petitioner's official duties. Nor, is there any allegation, or claim by the prosecution (as, indeed, there could not be) that the money alleged to be involved was, or was represented by him as being payable to him by law for any service within the scope of his official duties.

The district court overruled petitioner's motion to dismiss Count I for failure to state an offense. R. I-50-62; II-253.

Further, the district court instructed the jury, R. XII-2272, that

> under color of right * * * means an attempt by an accused by virtue of his official position to obtain or induce the payment of money from another, with his consent, which was not due the accused or his office.

The district court overruled petitioner's objection to this instruction, and his request that the jury be instructed that "under color of right" requires a claim by the accused to the payment allegedly demanded, "under some semblance of right * * * because of being an officer," in other words, that "he had some official right to it." R. XII-2314-3318;[2] 2324.

In affirming, the court below said, App. A, p. 13a, *infra*,

> At bar we have the governor of a state dealing with a board with which he not only purports to have influence but indeed has influence. He exploited the belief in the victim in order to obtain payments. In doing so he induced payment "under color of official right."

2. The pages of the record numbered 3315-3323, appear to be misnumbered, and properly to be pages 2315-2323.

But, the legislative history of the Hobbs Act permits no conclusion other than that "extortion * * * under color of official right" as used in that Act does not encompass obtaining money by a public officer for a service not within the scope of his official duties. 91 Cong. Rec. 11839-11848, 11899-11922 (1945). The Hobbs Act's definitions of "extortion" and "robbery" were taken from the New York Penal Law and for that reason New York law has particular pertinence in their interpretation. *United States* v. *Nedley,* 255 F.2d 350, 355 (3d Cir. 1958).

Thus, in the debate on the bill which became the Act, Representative Hobbs, who sponsored it, said "there is nothing clearer than the definition of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York Code substantially." 91 Cong. Rec. 11900 (1945). And Representative Michener, in supporting the bill, said that "there has been and will be so much talk about what constituted robbery and extortion and it is well to remember that the New York definitions are being used in this bill." 91 Cong. Rec. 11843 (1945). See also, statements of Representative Walter and Representative Russell at 91 Cong. Rec. 11842, 11914 (1945); *United States* v. *Nedley, supra,* 255 F.2d at 355.

The definition of "extortion" in the Hobbs Act is:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The definition of "extortion" in §850 of the New York Penal Law of 1909, as amended and in effect in the period 1917-1967, was:

> Extortion is the obtaining of property from another, or the obtaining the property of a corporation from an officer, agent or employee thereof, with his consent, induced by a wrongful use of force or fear, or under color of official right.

This definition was implemented and applied, in respect of the commission of extortion by "force or fear" by §§851, 852, 853 and 857, and in respect of the commission of extortion "under color of official right" by §855, which provided:

> A public officer who asks, or receives, or agrees to receive, a fee or other compensation *for his official service*:
>
> 1. In excess of the fee or compensation allowed to him by statute therefor; or,
>
> 2. Where no fee or compensation is allowed to him by statute therefor,
>
> Commits extortion and is guilty of a misdemeanor. [Emphasis supplied][3]

Thus, in New York law, from which the Hobbs Act's definition of extortion "under color of official right" was taken, an essential element of the crime was that the payment induced by the public officer be as a fee or other compensation "for his official service", *i.e.*, for action within the scope of his official duties. See, *People* v. *Samuels*, 188 Misc. 607, 71 N.Y. Supp. 2d 562 (1946). This, clearly, is what the phrase "under color of official right" imports.

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3. §854 made it the crime of "oppression" where a public officer or a person pretending to be such, unlawfully and maliciously, under pretense or color of official authority arrests or otherwise detains another against his will, seizes or levies upon another's property, dispossesses another of any real property or does any other act whereby another is injured in his person, property or rights.

For, the offense lies in the inducement of a payment "under color of *official* right" to it, and there can be no *official* right to the payment, colorable or otherwise, unless the act for which the public officer seeks to induce it, is within the scope of his official duties.

Moreover, in implementing so much of the definition in §850 as relates to extortion "under color of official right", §855 tracks the common law, under which a public officer committed extortion *only* when he induced the payment of compensation not lawfully due him, for a service within the scope of his official duties. Thus, in the succinct statement of the common law in the court's notes to *Commonwealth* v. *Mitchell,* 3 Bush 25, 96 Am. Dec. 192 (Ky. 1867), as quoted with approval in *La Tour* v. *Stone,* 139 Fla. 681, 693, 190 So. 704, 709 (1939), it is said in pertinent part:

> * * * In a general sense extortion signifies any oppression under color of right; but technically it is the corrupt demanding and receiving by an officer, by color of his office, of money or other thing of value, that is not due at all, or more than is due, or before it is due [citations omitted] * * *.
>
> * * *
>
> * * * A taking under color of office is of the essence of the offense. The money or thing received must have been claimed or accepted in right of office, and the person paying must have yielded to official authority [citations omitted]. Therefore, it is not extortion if an officer receives a compensation or fee for services which are not his official duty to perform [citations omitted].

The court below would enlarge the crime of "extortion * * * under color of official right" to the inducement of a

payment by a public officer for a service outside the scope of his official duties, to which payment, perforce, he has no "color of official right". But, in *Morissette* v. *United States,* 342 U.S. 246, 263 (1952), this Court said:

> The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly * * * admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

There is, however, in recent decisions of the courts of appeals under the Hobbs Act, a discernible trend away from the salutary restraints of *Morissette,* toward what may be called creative innovation, and to expand, wholly without statutory warrant, the limits of extortion far beyond those known in the body of law from which the Hobbs Act definition was expressly taken. The case at bar is typical of such decisions.

The trend is new. Thus, in 1958 the 3d Circuit properly reversed a conviction for violation of the Hobbs Act because the district court had expanded robbery, beyond its historic limits, to include interference with dominion not involving a taking. *United States* v. *Nedley,* 255 F.2d 350,

353-358. Yet, in 1974, the 7th Circuit said in *United States* v. *Braasch*, 505 F.2d 139, 151, a case on which the court below relies, App. A, pp. 11a-12a, *infra*, that for the purposes of extortion "under color of official right" under the Hobbs Act:

> It matters not whether the public official induces payment to perform his duties or not to perform his duties, or even, as here, to perform or not perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for payment focuses on the recipient's office, the conduct falls within 18 U.S.C. §1951.

This is nothing less than the judicial creation of a new crime, wholly unknown in New York law, from which the Hobbs Act concept of extortion "under color of official right" was taken, and in the common law, from which New York, in turn, took the concept. See also, *United States* v. *Trotta*, 525 F.2d 1096, 1100 (2d Cir. 1975), which the court below strangely considered "a case closely similar to the one before us," App. A, p. 13a, *infra*, where the court paid lip-service to the limits of the crime under common law, but quoted with approval the passage quoted above from *Braasch*.[4] Again, in *United States* v. *Mazzei*, 521 F.2d 639 (3d Cir. 1975), on which the court below also relies, App. A, pp. 12a, 13a, *infra*, a Hobbs Act conviction for "extortion * * * under color of official right" was affirmed although

4. In *Trotta*, a town commissioner of public works, whose official duties included letting, and supervising performance under public works contracts, induced a town contractor to make a political contribution, the plain, if unspoken, implication being that his failure to make such contribution would adversely affect his obtaining other contracts. Thus, *Trotta* has no similarity to the case at bar. *Trotta*, moreover, seems clearly to fit into the classic mold, and there was no need there to rely on *Braasch*.

the court which decided *Nedley* in 1958, forthrightly acknowledged, 521 F.2d at 643, that it was "clear, of course," that the service involved was not within the scope of the defendant's official duties. That seems also to have been the decision in *United States* v. *Stasczuk*, 502 F.2d 875 (7th Cir. 1974).[5]

Without speculating why this Court denied petitions for certiorari in all of these cases,[6] it may be observed that, in consequence, a body of law has been developed by the Courts of Appeals, which is in defiance of the principle announced by this Court in *Morissette*, and has no root in the statutory language or the congressional intent. If the teaching of this Court in *Morissette* still has validity, the process whereby the Courts of Appeals have in effect created a new crime by enlarging the reach of extortion "under color of official right", as enacted in the Hobbs Act, should be stayed, and rolled back, lest they be encouraged further to exercise judicial power to expand the scope of federal criminal law beyond its statutory content. This Court has not addressed itself to the question whether extortion "under color of official right", as used in the Hobbs Act, requires that the service for which payment is induced, be within the scope of the defendant's official duties, as did both the New York law from which the Hobbs Act's concept of the offense was taken, and the common law, from which

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5. In *United States* v. *Crowley*, 504 F.2d 992 (7th Cir. 1974), and *United States* v. *Irali*, 503 F.2d 1295 (7th Cir. 1974), *cert. denied* 420 U.S. 990, also cited by the court below in support of its affirmance, App. A, p. 12a, *infra*, the act for which the defendants took compensation came within the scope of their official duties.

6. *Braasch* at 421 U.S. 910; *Stasczuk* at —— U.S. ——, 96 S. Ct. 65; *Mazzei* at —— U.S. ——, 96 S. Ct. 446; and *Trotta* at —— U.S. ——, 44 U.S.L.W. 3659.

the New York law derived.[7] This is an important question of federal law because it involves the interpretation of a crucial aspect of an important federal penal statute of wide application.

In affirming petitioner's conviction under Count I, the court below has decided an important question of federal law which has not been, but should be, settled by this Court.

2. *In indicting petitioner for conspiracy to violate, and violating the Travel Act, Tit. 18 U.S.C. §1952, the Grand Jury charged that the "unlawful activity" comprised separate offenses against two provisions of Oklahoma law. By directing that the trial be conducted, and conducting it as though the averments of the second alleged offense were not in the indictment, the district court in legal effect amended the indictment. In nevertheless affirming petitioner's conviction, the court below decided a federal question in a way in conflict with applicable decisions of this Court.*

In the Travel Act conspiracy charge against petitioner and others, the Grand Jury charged, R. I-4, that the "un-

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7. In *United States* v. *Nardello*, 393 U.S. 286 (1969), this Court had under consideration whether extortion in violation of State law within the meaning of the Travel Act, Tit. 18 U.S.C. §1952, included only offenses classified by State law as "extortion" or extended to other extortionate crimes under State law, but called by some other name, as, for example, "blackmail". In passing, this Court said, 393 U.S. at 289:

> At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion.

But this Court expressed no view as to what constitutes "under color of office," which is, in effect, the question here.

lawful activity'' under the Travel Act was, in pertinent part:

> a scheme to bribe a public officer or public officers of the State of Oklahoma * * * in violation of Section 381, Title 21, Oklahoma Statutes *and to accept such a bribe in violation of Section 382, Title 21, Oklahoma Statutes* * * *. [Emphasis supplied]

Similarly, in charging petitioner with violations of the Travel Act, the Grand Jury charged, R. I-6, 7, that the ''unlawful activity'' under the Travel Act was, in pertinent part:

> to bribe John Rogers, a public officer of the State of Oklahoma * * * in violation of Section 391, Title 21, Oklahoma Statutes, *and to accept a bribe himself in violation of Section 382, Title 21, Oklahoma Statutes* * * *. [Emphasis supplied]

After the jury had been impaneled, but before it was sworn, the district court summoned counsel to the bench and, among other things, stated, R. VIII-165, 167, 168:

> * * * You probably have already noted that in my explanation of the case to the jury, that I made no mention of those parts of the Indictment that refer to the acceptance of a bribe. If you Gentlemen will recall my order on the motions to dismiss, I have considered that as a surplusage and do not intend to instruct on it. I tell you this now so that you may conduct yourselves that way with reference to your opening statements and with reference to the presentation of evidence. I consider this matter of surplusage and I, out of an abundance of caution, fearful that this could be some measure of inconsistency * * * as to Hall, so out of an abundance of caution, and since the Counts involved with this, treated as surplusage, still set forth alleged viola-

> tions of the Statute, I have decided to precede [*sic*] this way in this case.

On the contrary, however, in his order denying petitioner's motions to dismiss, the district court did *not* hold or consider the averments in question to be surplusage. R. II-253. While petitioner had contended in support of his motion that such averments were insufficient to charge an offense under Oklahoma law, the District Court was most careful *not* to decide that question. Thus, in his order denying the motions to dismiss, the district court said in pertinent part, App. D, pp. 71a-72a, *infra;* R. II-258, 259:

> The unlawful activity alleged in these counts [*i.e.*, counts II, III and IV] is twofold: the bribery of John Rogers in violation of 21 O.S. §381 and acceptance of a bribe by David Hall in violation of 21 O.S. §382. The defendant Hall's argument * * * maintains that allegations concerning acceptance of a bribe by Hall are insufficient to show a violation of Oklahoma law * * *. *Assuming arguendo the insufficiency of the allegations to establish the unlawful activity consisting of accepting a bribe,* such defect is not fatal to the indictment. The allegations concerning the attempt to bribe Rogers are sufficient to establish the necessary unlawful activity. * * *
>
> The validity of the Indictment is not affected by the fact that the pleader *may* have mistakenly stated the acts alleged to be a violation of both 21 O.S. §§381 and 382. * * * [Emphasis supplied]

Without further ado, the district court then went on to cite and quote from *Ford* v. *United States,* 273 U.S. 593, 602 (1927), and *United States* v. *Strauss,* 283 F.2d 155 (5th Cir. 1960). In *Ford* it was said in respect of an averment in a conspiracy indictment that the defendants conspired

inter alia to violate a treaty—on its face, *not* an offense—that "a useless averment is innocuous and may be ignored". In *Strauss* it was held that a one-count indictment charging a conspiracy to violate two statutes was not subject to dismissal where the allegations in regard to one, but not to the other were insufficient.

But, in overruling petitioner's motions to dismiss, App. D, pp. 64a-74a, *infra,* the district court did *not* hold that "those parts of the indictment that refer to the acceptance of a bribe" by petitioner, R. VIII-167, were surplusage. And, it is clear from the District Court's above quoted statement at the Bench, R. VIII-167, 168, that it was *not* because such averments were, "useless" and "innocuous", as in *Ford,* or insufficiently pleaded as in *Strauss,* that he held them to be surplus. Rather, it was because he was

> * * * out of an abundance of caution, fearful that this could be of some measure of inconsistency * * * as to Hall, so out of an abundance of caution, and since the Counts involved with this, treated as surplusage, still set forth alleged violations of the statute * * *

that the District Court decided to eliminate them for the purposes of the trial. In short, the District Court sought to cure the indictment of a possible defect, which "could" be troublesome to the prosecution, by amending it, in legal effect. See, *e.g., Gaither* v. *United States,* 413 F.2d 1061, 1071 (D.C. Cir. 1969).

Petitioner's objection to such action was overruled, R. VIII-179, and the trial proceeded as though "those parts of the Indictment that refer to the acceptance of a bribe" by petitioner, had been stricken from it. Thus, in reciting the

indictment to the jury in his instructions to them, the District Court omitted all reference to them. R. XII-2259, 2266.

In affirming, the court below recognized, App. A, pp. 8a-11a, *infra,* that what was involved was an amendment of the indictment, but gave lip-service, and nothing more, to this Court's controlling decision in *Ex parte Bain,* 121 U.S. 1 (1887) and *Stirone* v. *United States,* 361 U.S. 212 (1960), that the Fifth Amendment forbids any such amendment of an indictment. Moreover, notwithstanding this Court's express reaffirmance of *Bain* in *Stirone,* 361 U.S. at 215, 216, the court below saw in *Stirone* some weakening of *Bain,* saying that, App. A, p. 9a, *infra, Stirone*

> held that the trial court was powerless to enlarge upon charges contained in the Grand Jury indictment. It did not, however, rule that a court was unable to *withdraw* charges and thus narrow the defendant's liability. [Emphasis by the court]

But since *Stirone* did *not* involve the "withdrawal of charges made in an indictment, there was no need for any "ruling" in that connection. Nevertheless, the court below strangely failed to observe that this Court made it plain in *Stirone* that in reaffirming *Bain* and its teaching, it was reaffirming that the Fifth Amendment barred judicial excision of charges from an indictment, as well as additions thereto. Thus, in *Stirone,* this Court said, 361 U.S. 215, 216:

> Ever since Ex parte Bain, 121 U.S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. In that case, the court ordered that some specific and relevant allegations the grand jury had charged be

stricken from the indictment so that Bain might be convicted without proof of those particular allegations.[2] In holding that this could not be done, Mr. Justice Miller, speaking for the Court said:

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." 121 U.S. 1, 10.

2. Bain was indicted for making a false statement "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs of said association . . . ." After sustaining demurrers of Bain to the indictment, the trial court went on to say that "thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words *'the Comptroller of the Currency and'* therein contained." By this amendment it was intended to permit conviction of Bain without proof that he had deceived the Comptroller as the grand jury had charged.

So, too, in the case at Bar.

And, footnote 2 to *Stirone,* and the text that precedes it, quoted above, are the short answer to the conclusion of the court below, in affirming, that there was "no prejudice to Hall" in the District Court's action because "it reduced the charges against Hall". App. A, p. 11a, *infra.*

Moreover, apart from correcting matters of form, typographical errors, and the like, the amendment of an indictment other than by the grand jury, deprives the accused of his Fifth Amendment right not be tried for felony ex-

cept on the indictment of a grand jury, and because *Bain* "apparently excludes any notion of a non-prejudicial amendment * * *, the concept of harmless error has not been applied to amendments" of indictments. *Gaither* v. *United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969). The court there found confirmation of this in *Stirone* in that the variance which this Court found "substantial enough to amount to a constructive amendment" was condemned not because it "deprived the defendant of notice or protection against double jeopardy, but rather that it infringed on his 'right to have the grand jury make the charge on its own judgment' ". 413 F.2d at 1072. Indeed, in *Stirone* this Court said, 361 U.S. at 217:

> While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

The court below also relies on Rule 7(d), *F.R.Crim.P.*, as having somehow made *Bain* "less absolute". App. A, p. 10a, *infra*. But Rule 7(d) expressly provides that "The Court *on motion of the defendant* may strike surplusage from the indictment * * *" [emphasis supplied] and, of it, the Advisory Committee on Rules has, in a Note to it, authoritatively stated:

> This rule introduces a means of protecting the defendant against immaterial as irrelevant allegations in an indictment * * *, which may, however be prejudicial. *The authority of the Court to strike such surplusage is to be limited to doing so on defendant's motion, in*

> *the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended.* Ex parte Bain, 121 U.S. 1. By making such a motion, the defendant would, however, waive his rights in this respect. [Emphasis supplied]

But, it may be noted that in *Crosby* v. *United States,* 359 F.2d 743, 745 (D.C. Cir. 1964), the court said that a judicial amendment to a grand jury indictment "cannot be accomplished even with a defendant's consent. The Supreme Court has ruled that the Fifth Amendment's guarantee may not be so undermined."

In reaffirming *Bain* once again, this Court said in *Russell* v. *United States,* 369 U.S. 749, 770 (1962), that the

> * * * settled rule in the federal courts [is] that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. *Ex parte Bain,* 121 U.S. 1; *United States* v. *Norris,* 281 U.S. 619; *Stirone* v. *United States,* 361 U.S. 212.

The court below relies also on *Salinger* v. *United States,* 272 U.S. 542 (1926) and other cases holding that at the close of a trial, the court may withdraw from the jury's consideration such part or parts of the charges in an indictment as are without support in the evidence. App. A, p. 10a, *infra.* But, as this Court said in *Salinger,* 272 U.S. at 548:

> The contention [is] that the court by withdrawing from the jury a part of the charge as without support in the evidence, amended the indictment * * *. The indictment was not amended either actually or in legal effect. It remained just as it was returned by the

> grand jury, and the trial was on the charge preferred in it and not on a modified charge.

This Court then went on to say, 272 U.S. at 549, that withdrawing charges from the jury for want of support in the evidence, does

> not work an amendment of the indictment and * * * [is] not even remotely an infraction of the constitutional provision that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

Bain's pertinence here rests not only in the principle it enunciates, but in its enunciation of that principle in circumstances almost identical with those here presented. There, the indictment charged that the accused filed a false report "with intent to deceive *the Comptroller of the Currency and* the agent appointed to examine the affairs" of a certain banking association. The trial court amended the indictment by eliminating the words "the Comptroller of the Currency". In *Bain,* this Court said, 121 U.S. at 9, 10:

> The learned judge who presided in the circuit court at the time the change was made in this indictment, says that the court allowed the words, "Comptroller of the Currency and," to be stricken out as surplusage * * *. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests on the validity of the court's action in permitting the change in the indictment upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such a change to be made. He goes on to argue that the grand jury would have found

> the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument. While it may seem to the court with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible nor very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive * * *. How can the court say that there may not have been more than one of the jurors who found this indictment who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else?

The impact of the foregoing on the case at bar needs no elaboration.

In affirming petitioner's conviction under Counts II, III and IV, the court below decided a federal question in a way in conflict with applicable decisions of this Court. *Ex parte Bain,* 121 U.S. 1 (1887); *Stirone* v. *United States,* 361 U.S. 212 (1960); *Russell* v. *United States,* 369 U.S. 749 (1962).

3. *The ingestion by a 65-year-old juror of drugs comprising tranquilizers and pain-killers, and ex parte telephone communications by the trial judge with her physician, and through him with the juror, while she was hospitalized, in which the trial judge told the physician that he*

"would like to finish" the case "today", are, in the circumstances of the case, matters which could influence the juror's consideration of the case, and in the absence of a showing that they did not, it is to be presumed that they did, thus denying petitioner his Sixth Amendment right to trial by an impartial jury. There was no such showing, and, in addition, in affirming petitioner's conviction, the court below has so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The jury was instructed and sequestered for the duration of its deliberations before lunch on March 12, 1975. R. XII-2327-2333. The following day, at 4:30 in the afternoon, the district court advised counsel that he had a message from the jury, R. XII-2345, 2346,

> they would like to knock off at 4:30 today. Apparently they hadn't reached a verdict. One of the jurors is not feeling well and she does have a doctor which can be gotten to her, either by taking her there or causing the doctor to come to the hospital; under this early layoff, this would be possible. * * *

There was no objection, and the jury was recessed for the day. R. XII-2347-2349.

Although the record does not show it, but see, App. C, p. 54a, *infra*, sometime early the next morning, March 14, 1975, the trial judge must have advised counsel that the juror had been taken to the hospital, for at 11:30 that morning there was a proceeding in chambers at which certain documents were marked and admitted in evidence as

Court's Exhibits 5, 6 and 7[8] at the request of petitioner's attorney, who thereupon moved for a mistrial, on the grounds, *inter alia,* R. XII-2350, 2351:

> * * * that a juror who was, in fact, even apprehensive of possible heart attack or heart problems or chest pains relating to the heart would be more reluctant to engage in arguments and engage and express her opinions to the other jurors strongly and would be reluctant to engage in conflicting discussions and arguments with other jurors. On the further grounds that a juror who is, in fact, under medication may be not possessed, in fact, their full facilities so as to freely exercise their own good judgment and good common sense in order to arrive at a verdict in this cause and to participate in deliberations of the Jury. And on the further grounds that to proceed with this Juror, for the grounds previously stated here above, would be a violation of the Defendant's right to due process of law and violation of his Fifth and Sixth * * * [Amendment] Rights * * *.

Petitioner's attorney then requested the court to continue the proceeding to 1:30 that day so that he could subpoena the physicians who examined and treated the juror, to testify in connection with his motion, R. XII-2352,

> * * * inasmuch as I don't know what drug or drugs, if any—well, I presume there are some, but I don't

8. The judge described the exhibits as follows, R. XII-2350:

> * * * Court's Exhibit Five * * * [is] the report of the nurse who saw Juror Meyer yesterday; and Court's Exhibit Six is a report from the St. Anthony Hospital and a doctor there who received Juror Meyer in the Emergency Room at 5:25 this morning. Court's Exhibit Seven is a narrative report from the bailiffs about this incident, under date of March 14, 1975. It is not signed, Gentlemen, but I think it's the report, says, "The writer and Mrs. JoAnn Merck;" Mrs. JoAnn Merck is a female bailiff. I don't know who the writer is; if its important to you, it can be ascertained and we will add it at the bottom.

See, Supplemental Record, Volume 1.

> know what they are, or prescription of medicine she is now under or has been given prior to this time, or the length of time that such prescriptions or drugs would affect her * * *.

Thereupon, following negative responses to his inquiries whether petitioner would proceed without the juror, and whether petitioner had "any other evidence to present * * * now in support of your motion," R. XII-2353, 2354, the trial judge said:

> Now, I think I should state in the record that I have received Court's Exhibits Five, Six and Seven; and outside of that, *all I know is that Doctor Sanbar, about 10:30 or a quarter of 11:00, called me on the telephone, said that Mrs. Meyer had not suffered a myocardial infarction, or a heart attack, that she had some arthritic pains in one of her knees and that she's had some pains in her chest and that he examined her, administered to her, and that in his professional opinion she would be ready to resume her duties as a juror in this case at 1:30 today, releasing her from the hospital for this purpose.* And on this professional information, the motion will be overruled, mistrial will not be declared. The Jury will resume, all 12, at 1:30. [Emphasis supplied][9]

The court's telephone conversation with Dr. Sanbar was wholly *ex parte,* without prior notice to petitioner, and without petitioner or his attorney being present. But, notwithstanding the denial of his motion for a mistrial, peti-

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9. Following this denial of petitioner's motion for a mistrial, the District Court strongly urged counsel to agree to proceed with eleven jurors, and was highly critical of their unwillingness to do so. R. VIII-2355, 2356. This undoubtedly reflected his anxiety to "finish" the case "today", expressed in his *ex parte* telephone conversation with the juror's physician earlier that morning. See p. 28, *infra*.

tioner subpoenaed the physicians to appear in chambers, moved, at about 2:40 in the afternoon, for reconsideration of his motion, and to present the testimony of the physicians in support thereof. The juror was summoned to chambers from the jury deliberation room (to which she had been returned at about 1:30) and signed waivers of her physician-patient privilege. R. XII-2356-2363. On examination by the judge, Dr. Sanbar testified with respect to the telephone conversation between himself and the judge, as follows, R. XII-2407-2409:

> The Court: And some time around eleven o'clock, did you call me and tell me that it was appropriate for her to resume her duties as a juror in this case at 1:30 today?
>
> The Witness: *No, sir. I told you that I believed that she should stay until tomorrow and stay in the hospital. Then you advised me that you would like to proceed with the case and that you would like to finish it today and is it possible to get her back. And I told you I would go back and talk to the patient and see if she's up to it, and you remained on the telephone—*
>
> The Court: Did you do that?
>
> The Witness: *And I went back in and talked to the patient and asked her if she felt well enough to leave the hospital on her own and go back and resume her normal activities. And I returned to the telephone and told you that the patient feels up to going back to resuming her work. That's what I said.*
>
> The Court: Well, did you also tell me that it would be appropriate for her to do that?
>
> The Witness: I said that in my opinion she was—she did not have a heart attack and that I felt that she could leave the hospital. But I repeat, my first advice was to keep her until tomorrow morning for observation.

The Court: But then when I suggested that we could resume maybe at 1:30, did you go back and hold me on the phone while you made a further whatever you did?

* * *

The Witness: I went back and talked to the patient in front of the Deputy.

The Court: Then what did you come back and tell me?

The Witness: I told you that the patient felt well enough, according to her, to return and resume deliberations.

* * *

The Court: *Did you authorize her release today to come back and go to work at 1:30 as a juror?*

The Witness: *I only discharged her from the hospital.* [Emphasis supplied]

It further appeared from Dr. Sanbar's testimony that morning he had directed that she take one Motrin 400—"a medicine for arthritis pain"—four times a day, and that at his direction she had been given 5 milligrams of Valium—a tranquilizer—at noon, an hour and a half before she was returned to the jury deliberation room. R. XII-2390, 2399-2401. Notwithstanding Dr. Sanbar's testimony concerning the telephone conversation between the judge and himself, the former, in again denying petitioner's motion for a mistrial, said, R. XII-2419-2420:

* * * I asked him specifically his judgment about whether we could resume at 1:30 today. He said, "just a moment. I would like to go back and look at her again;" the way I understood it, words to that effect. He came back and said it was alright to resume at 1:30 today. * * * I would not have put her back to work without medical approval of this. This I had from this

> doctor. He did discharge her as of Noon today. He told me that she did not have a heart attack. I didn't know about the Valium until today, until this hearing; he didn't tell me that he had prescribed it or that she was going to take it. * * *

Notwithstanding Dr. Sanbar's testimony, uncontradicted of record, the trial judge repeated again, in denying petitioner's post-verdict motions, that he reconvened the jury for further deliberations with the "approval" and on the "advice" of Dr. Sanbar. App. C, pp. 43a, 44a, *infra.*

Thus, the trial judge determined in his own favor the issue of credibility as between Dr. Sanbar and himself as to what Dr. Sanbar said during their *ex parte* telephone conversation. And in affirming petitioner's conviction, the court below said, App. A, p. 18a, *infra.*

> Although * * * [Dr. Sanbar] recommended overnight hospitalization, he did not insist upon it and was governed by her own estimation of her physical condition. Given the fact that she was able to leave on March 14, there was an inference that the doctor was willing to discharge her *for the purpose of jury duty.* The difference between his account and that which the judge reported is insignificant. [Emphasis supplied]

But in direct response to the judge's inquiry of Dr. Sanbar whether he authorized "her release today *to come back and go to work at 1:30 as a juror*", Dr. Sanbar replied, as set out above, p. 29, *supra;* R. XII-2409:

> I *only* discharged her from the hospital. [Emphasis supplied]

Certainly, such testimony does not permit the inference, supportive of the trial judge's version of what Dr. Sanbar said in their *ex parte* telephone conversation, which the court below would construct.

As Dr. Sanbar was being excused, and just prior to the district court's second denial of petitioner's motion for a mistrial, the court announced that "the jury reports they have a verdict." R. XII-2417. Thus, petitioner's motion for a mistrial alone stood in the way of the judge's desire, expressed to Dr. Sanbar in their *ex parte* telephone conversation, as set out above, "to finish" the case "today." R. XII-2408.

But, for whatever reason, the trial judge, in denying the motion for a mistrial, and the court below, in affirming, brushed aside the testimony of both Dr. Richtner, the hospital resident, and Dr. Sanbar, her personal physician, R. XII-2419, 2420; App. A, pp. 16a-19a, *infra,* from which appeared that:

The juror was a 65-year-old woman with a history of high blood pressure, "pain in her chest relating to her heart," *i.e.,* angina, for which she had been hospitalized, and arthritis. At about six o'clock the evening of March 13, the day the jury's deliberations were recessed early because she "was not feeling well," a bailiff called Dr. Sanbar and the juror, getting on the telephone, told him that she had "pain in her left chest and was nervous." She had with her some Dalmane, a sleep inducer and some Valium, a tranquilizer. Dr. Sanbar told her to take two Valium tablets, that if she was still nervous at nine o'clock to take

another and a Dalmane, and that if she were not asleep by eleven, to take another Dalmane. R. XII-2371, 2386-2391.

At about five-thirty the morning of March 14, two bailiffs brought her to the emergency room of a hospital, complaining of chest pain. R. XII-2350, 2367. Dr. Richtner, the resident physician, examined her, and within the hour she was given a shot of Demerol, "a narcotic-like agent for pain." R. XII-2367-2369.

Shortly after examining the juror, Dr. Richtner telephoned Dr. Sanbar and reported the situation to him. The juror was "apprehensive or nervous," but a cardiogram "did not show any evidence of heart attack." Dr. Sanbar asked Dr. Richtner to make an enzyme test, and "to keep her overnight in the hospital in the event that there is any minor abnormalities, in order to be sure that she's not going to have a heart atack." The enzyme test proved to be "border line," and Dr. Sanbar asked Dr. Richtner to keep the juror in the hospital until he could see her. Dr. Sanbar saw the juror at the hospital at 10:30 or 11 o'clock that morning, and found no evidence of a heart attack, but he was not sure whether her chest pains were due to her heart or her arthritis. R. XII-2368, 2392-2397, 2411-2412.

It was then that Dr. Sanbar directed that she be given a Valium—a tranquilizer—at noon, and take one Motrin 400 —a pain-killer—four times a day. R. XII-2390, 2399-2401; p. 29, *supra*. While Dr. Sanbar testified that the juror "takes" Valium "during the day at home," on his prescription, he had never seen her after she had taken some and thus could not say how it affected her judgment, R. XII-

2415-2417. In response to a question whether the Valium she took at noon would affect her ability to exercise judgment, Dr. Sanbar stated, R. XII-2402, 2403:

> This is truly a very difficult question to answer for me, because every individual varies and even though I have known her since '73, I honestly cannot answer that unless I see her and see what she does. And usually to answer such a question requires even somebody who is more specialized than I am, a psychiatrist, to determine judgment. The Valium, no question, influences people, relaxes them. And I know this seems I am talking in generalities because I cannot, and I repeat, I cannot be too emphatic about any individual when one gives Valium, it can literally put somebody to sleep, relaxes them so much, a 5 milligram dose; while in other people, 5 milligrams will be like a drink of water and because of the variability, it is very difficult to answer this question so specific.
>
> In her case, she stated to me that the Valium was helping her to relax and had been more collected, and that's really all I can say. It's very difficult for me to know how—what her judgment or recall of events, what Valium would have—what effect would Valium have on her recall or judgment. This is a very difficult question to answer.

He further testified, R. XII-2403-2404:

> Q. Now, you have not seen her since she took the Valium at 12:00 noon?
>
> A. No, sir. I saw her the last at eleven o'clock, I think around eleven o'clock.
>
> Q. Doctor Sanbar, let me ask you this: Is there a possibility that the taking of Valium, 5 milligrams, by Mrs. Meyer at 12:00 noon today could affect her exercise of judgment?

A. You're asking me is it possible that it could?

Q. Yes, sir.

A. I think it is possible that it could.

Q. Is it possible that the 5 milligrams of Valium taken at noon today would affect Mrs. Meyer's state of mind?

A. Again, it is possible that it could.

Q. Is it possible that the 5 milligrams of Valium taken by Mrs. Meyer at 12:00 noon today could affect her ability to recall past events?

A. Again, I think we are in the realm of possibility. A patient who is 65-years-old, and I again have to fall back on generalities in terms of medicine, older people given doses of medication tend to react more to them than, say, somebody my age. I may take Valium, 5 milligrams, and may not affect my judgment whatsoever. On the other hand, 65-years-old, we always give them lesser doses of medication. They most generally require less medicine and, therefore, we go back to the "could and possible" so I would have to put it in the realm, it could and be possible but I can't be very specific about her.

Again, Dr. Sanbar testified, R. XII-2415, 2416:

The Court: In this particular lady, do you have any idea as to whether taking the Valium tablet at 12:00 noon would keep her from being a reasonable person as far as her thinking processes are concerned?

The Witness: Sir, you have asked me this, I beg your indulgence, you have asked me this and I have been asked many times by everybody and I can answer, it has to be in the realm of could and possible. I don't know. I could not be any more specific.

The Court: Also, it could not have any effect on her reasoning?

The Witness: I believe it can affect her or it can not, it could be that she—

The Court: Then you just don't know?
The Witness: I don't know.
The Court: It could or could not.
The Witness: It's in the realm of could and possibility, that's the way I have to answer.

But Dr. Sanbar did testify, R. XII-2400, 2401:

> I believe Demerol works for approximately four to six hours effect and usually we have to give this medicine around every four hours to keep it level. It disappears from the body maybe around ten or so hours, so it lasts in the body obviously longer than, say, 5:30 till 1:30, so she obviously had some Demerol present in her system at 1:30. And of course, Valium was given at 12:00; and, again, Valium works in an almost similar timing, about four to six hours. We give narcotics usually around every four hours to keep patients comfortable.

At 4:30 p.m. the trial judge repeated in open court what he had previously reported in chambers, just as Dr. Sanbar was being excused, that the jury had reached a verdict, R. XII-2417, 2421, and at 4:40 the jury returned with its verdict of guilty. Accordingly, at all times while the juror Meyer was participating in the jury's deliberations between 1:30 and about 4:30, she was subject to whatever effect Valium had on her, and for most of that period still had Demerol in her system. Demerol is, as Dr. Richtner testified, a "narcotic-like agent for pain", R. XII-2368, 2369, and Valium is, under its generic name of diazepam, 40 F.R. 4016, 4017; R. III-489, 495, on Schedule IV of controlled substances under §202 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Tit. 21 U.S.C. §812, as a depressant. 21 CFR 1308.14.

Additionally, if the juror had followed Dr. Sanbar's instructions that morning (as to which the record is silent) by the time the jury returned its verdict, she had taken one or two Motrin 400's—the "medicine for arthritis pain". See p. 29, *supra;* R. XII-2399. Moreover she must have had a restless night since she was up and about before 5 o'clock in the morning, notwithstanding the two or three Valium tablets and the Dalmane which Dr. Sanbar had instructed her to take. Court's Exh. 7, Supplemental Record, Volume 1; R. XII-2371, 2386-2391.

The jury had not been able to arrive at a verdict between sometime before lunch on March 12 and 4:30 in the afternoon on March 13, when its deliberations were recessed because of Juror Meyer's illness. R. XII-2345-2347, 2349. Yet, the jury reached a verdict in less than three hours after her return on March 14. The natural inference from this is confirmed by broadcast interviews of Juror Meyer, given after the verdict. R. III-497-506. From these it appears that before the recess on March 13, she was steadfast for acquittal, but upon her return to the jury room on March 14, she, R. III-497,

> didn't feel very good. Not after you have had Demerol you don't feel good. * * * I just either had to give up or else. I didn't feel like I could spend another night up there * * *.

And further, R. III-500,

> And I just felt like that I just couldn't hold out any longer because I was still on the influence of that medicine which I had a shot and taken earlier tranquilizers.[10]

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10. In denying one of petitioner's post-verdict motions, the district court held that these transcripts were "outside the record". App. C, p. 57a, *infra.* But, they had been submitted to the district court in support of the very motion he was denying. R. III-483-486.

But wholly apart from any consideration of such interviews, *cf. United States* v. *Glick,* 463 F.2d 491 (2d Cir. 1972), Dr. Sanbar testified that it was "possible" that the Valium she had been given "could" affect her judgment, state of mind, recollection, thinking processes, reasoning, etc., although it was also possible that it might not. See pp. 33-34, *supra.* On the other hand, he testified, see p. 33, *supra,* that

> * * * Valium, no question, influences people, relaxes them. * * * it can literally put somebody to sleep, relaxes them so much, a 5 milligram dose * * *.

And, it was a 5 milligram dose that he had the juror take just an hour and a half before she returned to the jury room. See, p. 32, *supra.*

In these circumstances, it would seem clear that juror Meyer had been "subjected or exposed" to something, *i.e.,* drugs, particularly, Valium, "which might tend to * * * influence" her "consideration" of the case. And, in such circumstance, "a presumption arises against impartiality * * * [which] can only be rebutted by a clear and positive showing that * * * [it] did not influence" the verdict. See, *Baker* v. *Hudspeth,* 129 F.2d 779, 782 (10th Cir. 1942), *cert. denied* 317 U.S. 681; see also, *Mattox* v. *United States,* 146 U.S. 140, 150 (1892); *Ryan* v. *United States,* 181 F.2d 779, 780 (D.C. Cir. 1951).

In view of the tenor of Dr. Sanbar's testimony, which was given before the jury's verdict was returned, the district court should have granted petitioner's motion for a mistrial, or his post-verdict motion for a new trial, R. III-439, 441, 444-446, as there had been no showing whatsoever that juror Meyer's exposure to Valium, and the district

court's anxiety to "finish" the case "today", did not tend to influence her consideration of the case. In affirming, the court below said, App. A, p. 19a, *infra*:

> *The fact* that Mrs. Meyer returned voluntarily to jury duty is evidence that she had *some* will and individual determination. [Emphasis supplied]

But, obviously, whether a juror has been exposed to something "which might tend * * * to influence" her "consideration" of the case, does not hinge on whether it has stripped her of *all* will and determination. Moreover, is it a *fact* that she returned voluntarily? The district judge's telephone communication with Dr. Sanbar, and through him with the juror, was wholly *ex parte,* off the record, and without prior notice to petitioner. Furthermore, in later disclosing his communication with Dr. Sanbar to counsel, he made no mention of his statement to the doctor, as the doctor put it, that he, see pp. 28, *supra,*

> would like to proceed with the case and * * * would like to finish it today and is it possible to get her back.

Nor did he mention his communication with the juror through the doctor. R. XII-2354. But the judge's statement to the doctor (however actually made) must have had a coercive effect on Dr. Sanbar, for it impelled him, notwithstanding his considered professional judgment to keep the juror in the hospital another day, to let her go, if she had felt up to it. See p. 28, *supra.* And, if the district court's desire to "finish" the case "today" was conveyed by the doctor to the juror (which is probable, although, the record is silent on the point) it must unavoidably have had a coercive effect on her, "to finish it today". *Cf. Jenkins*

v. *United States,* 380 U.S. 445 (1965); *United States* v. *Thomas,* 449 F.2d 1177, 1181 (D.C. Cir. 1971).

Clearly, the district judge should not have communicated with Dr. Sanbar, or through him with the juror, by telephone, *ex parte* and off the record. Nor should he have undertaken to determine whether his or the doctor's version of their telephone conversation was correct. See, *United States* v. *Columbia Broadcasting System, Inc.,* 497 F.2d 107, 109 (5th Cir. 1974). Indeed, the question would not have arisen if the district court had followed the accepted and usual course of judicial proceedings, which, unless the parties agree otherwise, is to conduct all proceedings in a case in open court or in chambers, with prior notice to all parties and on the record. In affirming, the court below said, App. A, p. 21a, *infra*:

> The trial judge was faced with a difficult situation which made it necessary that he communicate with the doctor and through the doctor with the juror in order to ascertain her condition. The judge was the person best qualified to carry out the inquiry. We see no impropriety in the judge's communicating with the juror through the doctor.

Granting the difficulty of the situation and that it was necessary that the judge communicate with the doctor and through him with the juror, nevertheless, *propriety,* and more, clearly required that the communication with the doctor be in open court, or in chambers, on the record, and after notice to the parties.

Juror Meyer's ingestion of drugs, and the *ex parte,* off the record, telephone communications by the trial judge

with Dr. Sanbar, and through the doctor with the juror, being matters which might tend to influence her consideration of the case, and there being no showing that they did not, petitioner is denied his Sixth Amendment right to a trial by an impartial jury, and, additionally, in affirming petitioner's conviction in the circumstances of the case, the court below has so far sanctioned departures by the district court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

4. *The district court's communication with the juror's physician, and through him with the juror, described under 3, above, without petitioner being given an opportunity to be present, denied petitioner his fundamental right under Rule 43(a) of the Federal Rules of Criminal Procedure to be present at every stage of the trial, and such denial is aggravated by the failure of the district court to have such communication recorded. In nevertheless affirming, the court below decided a federal question in a way in conflict with applicable decisions of this Court, and so far sanctioned departures by the district court.*

Petitioner's right under Rule 43(a), F.R.Crim.P., to be present at every stage of the trial is a fundamental right having its roots in the Fifth and Sixth Amendments, and in their common law origins. In the absence of a waiver, it is not lightly to be denied. *Cureton* v. *United States,* 396 F.2d 671 (D.C. Cir. 1968); *Evans* v. *United States,* 284 F.2d 393 (6th Cir. 1964). Thus, in *United States* v. *Arriagada,* 451 F.2d 487, 488 (4th Cir. 1971), the court said:

> Rule 43 * * * requires the presence of the defendant at "every stage of the trial". Such rule, manifestly proscribing any communications by the Court with the jury, whether before or after it has begun its deliberations, without the presence of the defendant, has properly been described as "a salutary provision" which should be scrupulously observed by trial judges. Any departure from the rule is error and, "unless the record completely negatives any reasonable possibility of prejudice arising from such error", mandates a new trial. Jones v. United States (10th Cir. 1962) 299 F.2d 661, 662, cert. den. 371 U.S. 864, 83 S.Ct. 123, 9 L.Ed.2d 101.

Here, as petitioner had no prior notice that there was going to be any communication between the judge and the juror's physician, there can be no question of waiver.

Coercion by a judge of a physician to take action in regard to a juror, contrary to his considered professional judgment, and of the juror to reach a verdict "today", is a most serious matter. Such coercion is implicit in the physician's testimony concerning the judge's communication to him, see p. 28, *supra,* which may or may not accurately reflect the language actually used by the judge. And, the judge's failure to have his communication with the physician recorded, violated the spirit, if not the letter of the Reporter's Act, Tit. 28 U.S.C. §753(b). *Cf. Edwards* v. *United Statse,* 374 F.2d 24, 26 (10th Cir. 1967); *Parrott* v. *United States,* 314 F.2d 46, 47 (10th Cir. 1963); *Fowler* v. *United States,* 310 F.2d 66, 67 (5th Cir. 1962).

The communication was both private and unrecorded by *ex parte* and *sua sponte* action of the court. In this circum-

stance, and the other circumstances of the case, the affirmance by the court below decided a federal question in a way in conflict with applicable decisions of this Court, and so far sanctioned departures by the district court. *Rogers* v. *United States*, —— U.S. ——, 95 S. Ct. 2091 (1975); *Jenkins* v. *United States*, 380 U.S. 445 (1965).

5. *The district court refused to examine prospective jurors who had heard or read pretrial news accounts of the charges against petitioner, with particularity to elicit answers which would be a basis for objectively determining the impact, if any, of such news accounts on the juror's impartiality. The district court was content to rely on the jurors' subjective responses to general questions, to the effect that they had not formed opinions as to petitioner's guilt in consequence of having read or heard such news accounts, and that they could put aside any information they had gotten from such news accounts, etc. ..Petitioner is a well known public figure in Oklahoma, and pretrial news accounts of the case were read or heard by all proposed jurors who were examined. ..The nature of the news accounts was such that 4, or possibly 5, of the approximately 31 jurors examined admitted that they had formed opinions as the result of reading or hearing them. In affirming, the court below decided an important question of federal law which has not been, but should be, settled by this Court.*

In denying petitioner's motion for a continuance or a transfer of the case because of extensive and prejudicial pretrial publicity, the district court pointed to the examination of prospective jurors as *prima facie* affording adequate safeguards, holding, R. II-242; R. VII-60-62:

> * * * The procedural safeguards of the voir dire examination of jurors * * * provide the ultimate test of whether it is possible to select a fair and impartial jury from the panel selected from the vicinity where the publicity occurred. If utilization of this procedure demonstrates that it is not possible then a continuance or transfer or both on request are available for consideration.

Accordingly, in addition to requesting the court to ask twenty-seven questions, generally, of prospective jurors, petitioner requested the court to ask nineteen additional questions of each prospective juror (individually and not in the hearing of the others) who have "read or heard of or discussed this case or anything related to it or any of the defendants * * *." R. II-338-347.[11] These additional questions were calculated "to elicit answers which will provide an objective basis for an evaluation" of the prospective juror's impartiality. R. II-339, for, the defendant in a criminal case has the right to "probe for hidden prejudices of the jurors." *Lurding* v. *United States*, 179 F.2d 419, 421 (6th Cir. 1950). The District Court, however, denied petitioner's request for such additional examination, R. VIII-146, and was content to rely on the prospective jurors' untested *ipse dixit* that they had not "formed an opinion * * * about the guilt of either of the Defendants * * *" as the result of what they had "read, heard or listened to on the news media," or by any other discussion with anyone about this case * * *," and "will be able to put aside * * * anything" that they had "read, listened or

11. In referring to the nineteen additional questions, the court below fails to note that petitioner requested that they be asked *only* of such prospective jurors as had "read or heard of or discussed this case," etc. App. A, p. 23a, *infra*.

heard about this case in the news media." R. VIII-26-27, 33-35, 44-47, 54-55, 65-66, 75-76, 82-84, 92-93.

While the court below affirmed, it nevertheless acknowledged, App. A, p. 26a, fn. 12, *infra*, that:

> * * * it might * * * have been better practice in view of publicity involving a public figure to conduct individual *voir dire* of the prospective jurors. *See* ABA Standards Relating to Fair Trial and Free Press, Approved Draft, March 1968, Section 3.4.

Then, it added, "However, this does not suggest that it was error to fail to do so." On the contrary, it would seem to suggest more clearly that it was error. The court below advances no reason why anything less than the "better practice" can suffice to provide the trial by an impartial jury which the Sixth Amendment both assures and commands. Indeed, its only reliance is that this case "differs" in some respects from *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), *appeal after remand*, 430 F.2d 675 (1970), *cert. denied*, 400 U.S. 1022 (1971). But the differences are wholly without significance. Thus, in affirming, the court below said, App. A, pp. 25a-26a, *infra*:

> In * * * [*Silverthorne*], involving criminal charges against the president of a failed * * * bank, there was massive, inflammatory pre-trial publicity * * *. In contrast, the news reporting in the instant case was neither virulent nor massive. Moreover, in *Silverthorne* the prospective jurors had heard of the case, also 30 percent had formed prior opinions. Here, only three or four of the prospective jurors out of approximately 31 who were questioned had preformed opinions.

However, the question is not whether the journalistic style of the news accounts was of the "yellow" variety, or straight, or even understated. It is, rather whether the news reports, whatever their style, had an impact on the impartiality of the prospective jurors. Here, on the basis of the "three or four" postulated by the court below, somewhere between 9.67% and 12.9% of the prospective jurors *admitted* to "preformed opinions," which is hardly an insignificant segment of the group. Actually, however, there were at least four, and possibly five, which would bring the percentage up to between 12.9% and 16%. R. VIII-28, 150, 152, 156. Nor is the volume of the news reports, *per se*, of any importance. What is important is the extent to which prospective jurors had heard or read them. Here, although the court below is strangely silent as to it, *all* the prospective jurors who were examined (and consequently, all the jurors who sat on the case) had heard or read pretrial news accounts of the case. R. VIII-25, 26, 33, 34, 45, 46, 54, 65, 67, 75, 83, 92, 102, 103, 108, 114, 122, 130, 138, 149, 154, 158. Thus, here, the pretrial news accounts, which the court below dismisses as not being "massive," were, in fact, sufficiently extensive to have been heard or read by all the prospective jurors examined.

And, whether or not the pretrial news accounts which the prospective jurors heard or read were "virulent," they were sufficiently incisive to have caused some 13 to 16 percent of the jurors examined to admit that hearing or reading them had resulted in their having formed opinions concerning the case. Moreover, testimony of professional newspapermen taken at the hearing on petitioner's

pretrial motion for a continuance or transfer,[12] is that the pretrial newspaper accounts were prejudicial to petitioner, and effectively created prejudice against him in those who read them. R. IV-653, 654 [Hall Exhs. 1, 2]; R. VII-16-50.

The court below also dismissed pretrial "articles which reported investigations" concerning petitioner in regard "to other offenses" as not being "inflammatory." App. A, p. 25a, fn. 11, *infra*. But the fact of such investigations would not, of course, be admissible at the trial, and as this Court said in ordering a new trial in *Marshall* v. *United States*, 360 U.S. 310, 312, 313 (1959), because during the course of a trial, accounts of the defendant's inadmissible criminal record were published in the newspapers:

> The prejudice to the defendant is almost certainly to be as great when that evidence reaches the jury through news accounts as when it is part of the prosecution's evidence.

And, as the court said in *Silverthorne*, in circumstances thus not in their essentials dissimilar from those of this case, 400 F.2d at 638:

> * * * we conclude that the trial court's voir dire examination did not adequately dispel the probability of prejudice accruing from the pre-trial publicity and the

12. At this hearing the trial court declined to hear testimony of witnesses proffered by petitioner to show that the government was the source of much of the material contained in the pretrial news stories. R. VII-5, 6, 11, 50-52. Later, during the trial, the district court denied petitioner's motion for a mistrial when the prosecution released to news media, and the media used in news accounts, transcripts of tapes which were not in evidence. The court said there was no evidence that the unsequestered jurors had not complied with his admonition not to read or listen to anything concerning the case, etc. R. IX-524-532. But unless they were asked, there was no way of knowing whether they did or not. *Cf. Coppedge* v. *United States*, 272 F.2d 504, 507, 508 (D.C. Cir. 1959), *cert. denied*, 368 U.S. 855.

> jury panel members' knowledge of the case. This conclusion is predicated on two grounds: (1) the questions propounded by the court to the prospective jurors were calculated to evoke responses which were subjective in nature—the jurors were called upon to assess their own impartiality for the court's benefit, and (2) the entire voir dire examination was too general to adequately probe the prejudice issue.

That is, precisely what the court below, by its affirmance, sanctioned here.

Then, to leave no doubt as to the proper course for a trial court to follow in circumstances such as those here, the court continued, *id.*:

> We agree with the language of the *en banc* majority in United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir.), cert. denied, 372 U.S. 978 (1963) that in the absence of an examination designed to elicit answers which provide an objective basis for the court's evaluation, "merely going through the form of obtaining jurors' assurances of impartiality is insufficient [to test that impartiality]." 313 F.2d at 372. We find this expression to be forcefully applicable to the instant case. Each and every juror in the case before us had read or heard *something* about appellant's case. The trial court made no effort to ascertain *what* information the jurors had accumulated and, consequently, had no way of objectively assessing the impact caused by this pretrial knowledge on the juror's impartiality. [Emphasis by the court]

See also, *United States* v. *Addonizio,* 415 F.2d 49, 65 (3d Cir. 1972), *cert. denied,* 405 U.S. 936; *United States* v. *Starks,* 515 F.2d 112, 125 (3d Cir. 1975).

Here the court below affirmed notwithstanding the refusal of the trial court to ask questions of the prospective

jurors "designed to elicit answers providing an objective basis for the court's evaluation" of their impartiality, and merely went through "the form" of obtaining the juror's subjective assurances in that regard. And it affirmed although here, too, all the prospective jurors examined "had read or heard something" about the case, the trial court had refused to inquire what information they had accumulated, and accordingly, had no basis for "objectively assessing the impact" of the publicity on the juror's impartiality. A juror's *ipse dixit* as to his own impartiality is a slim reed, if reed at all, to lean on, for as this Court observed in *Irwin* v. *Dowd,* 366 U.S. 717, 728 (1961):

> No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father.

The court below refers, for the "better practice," which it did not, however, follow in this case, to Section 3.4 of The ABA Standards Relating to Fair Trial and Free Press, Approved Draft, March 1968. App. A, p. 26a, fn. 12, *infra.* In *Silverthorne,* 400 F.2d at 638, 639, the Ninth Circuit cited the same text in reversing a conviction where that practice was not followed. In *Addonizio,* 451 F.2d at 67, and *Starks,* 515 F.2d at 125, the Third Circuit announced that henceforth district courts would be required to follow such practice in appropriate cases. In substance, the practice, as stated in the ABA Standards cited above, is:

> Whenever there is believed to be a significant possibility that individual talesman will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect

> to his exposure shall take place outside the presence of other chosen and prospective jurors. * * * The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

While this Court has adverted to the problem of assuring trial by an impartial jury in the face of pretrial publicity, *see, e.g., Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966), it is not believed that this Court has decided what procedure should be followed in such cases, in the examination of prospective jurors who have been exposed to pretrial publicity concerning the case or the defendant, in order to assure trial by an impartial jury. Since trial by an impartial jury is both guaranteed and commanded by the Sixth Amendment, this is an important question of federal law which should be settled by this Court.

6. *Petitioner and a witness against him called by the prosecutor had been charged by the Grand Jury as co-defendants in the conspiracy count—Count II—of the indictment. On direct examination of the witness, the prosecutor elicited that fact, and also the fact that prior to trial the witness had pleaded guilty to Count II. On his cross-examination of petitioner, the prosecutor dwelt at length on the plea of guilty of such witness, the circumstances surrounding it and its consequences to the witness. In his summation to the jury, the prosecutor advanced the witness' plea of guilty and its consequences to him as assurances of his veracity as a witness. In the circumstances,*

the cautionary instruction of the district court was wholly inadequate, and petitioner was denied his Fifth Amendment right to a fair trial.

The fact of the prior conviction on plea of guilty, or otherwise, of a co-defendant is not evidence of the defendant's guilt, and, in consequence is not admissible in evidence, whether in documentary form, or elicited from a witness. Such evidence is, obviously, highly prejudicial to the defendant, and its admission is reversible error, particularly if it is emphasized, and in the absence of clearly curative instructions to the jury. *See, e.g., Leroy* v. *Government of Canal Zone,* 81 F.2d 914 (5th Cir. 1936); *United States* v. *Toner,* 173 F.2d 140, 142, 143 (3d Cir. 1949); *Babb* v. *United States,* 218 F.2d 538 (5th Cir. 1955); *Payton* v. *United States,* 222 F.2d 794, 796 (D.C. Cir. 1955); *United States* v. *Restaino,* 369 F.2d 544, 545 (3d Cir. 1966); *United States* v. *Newman,* 490 F.2d 139, 143 (3d Cir. 1974).

This is so even where testimony concerning a co-defendant's conviction is introduced inadvertently. *Newman,* 490 F.2d at 143 fn. 4. Here, the prosecutor inadvertently elicited testimony disclosing the co-defendant's guilty plea, and he compounded its prejudicial effect by unduly emphasizing it to the jury in his cross-examination of petitioner and his summation. *Cf. Payton,* 222 F.2d at 796.

At the close of his direct examination by the prosecutor, the prosecution's witness Mooney testified, R. VIII-303, 304:

> Q. Now, were you indicted in this case along with Mr. Hall and Mr. Taylor?
>
> A. Yes, I was.

Q. And how did you plead to Count Two, the Conspiracy Count?

A. I pleaded guilty to Count Two.

Q. Was that plea a result of an agreement with the prosecution?

A. Yes, it was.

Q. What was that agreement, sir?

A. In exchange for my testimony, my willingness to testify, my willingness to make a complete, open and full disclosure, that the Counts Five and Six would be dropped.

Q. And have those Counts been dropped?

A. They have.

Q. And did you enter that plea because you were guilty of Count Two?

A. Yes, I was.

The prosecutor reverted to Mooney's guilty plea in cross-examining petitioner, R. XI-1675-1680:

Q. You testified, Mr. Hall, that you believed that Kevin Mooney became a part of this conspiracy against you after he had entered a plea of guilty in this Court.

A. That's correct, Mr. Burkett.

Q. What do you believe that he did to further the conspiracy?

A. I believe he testified falsely.

* * *

Q. Were you in the Courtroom when he entered that plea of guilty?

A. Yes, I was.

* * *

Q. *He plead guilty, did he not, Mr. Hall, to conspiring with you and Mr. Taylor to use Interstate Com-*

merce for the purpose of—for an unlawful purpose, did he not?

A. He did but that was at your suggestion.

* * *

Q. Well, Mr. Hall, Mr. Mooney did state and the Court inquired into this agreement under which the matter, the plea, was entered; is that not true?

A. Yes. And Mr. Mooney—

Q. *Was it not represented to the Court, Mr. Hall, that Mr. Mooney was pleading guilty because he was guilty and that the—in return for his plea, the Government dismissed two other counts against him?*

A. You said that. Mr. Mooney said, when the Judge asked him, that there had been no agreement and you jumped up and said, "Oh, yes, there has. I've agreed to dismiss." That's exactly what happened in the Courtroom.

Q. Certainly. Do you have any reason to doubt that?

A. No. No. I believe it. I think that's what you agreed to do.

Q. Do you contend that Mr. Mooney plead guilty to an offense of which he was not guilty?

A. I don't know that in fact. I didn't advise him.

Q. You say that he is a part of this conspiracy and *I'm wondering if you're trying to tell this Jury that Mr. Mooney entered into a plea of guilty to a felony and subjected himself to the consequences of that plea, including, of course, his disbarment.*

A. That is correct.

Q. Merely as a plot to further a conspiracy against you?

A. No. No. I think Mr. Mooney, that he had been caught offering a bribe to Rogers, or extorting money, whichever way I take the tapes.

Q. Of course, that's not what he plead guilty to.

A. No. He plead guilty to the lesser offense, didn't he?

Q. *No, sir. He plead guilty to a conspiracy, entering into a conspiracy with you and Mr. Taylor to use Interstate facilities to violate a law.*

* * *

Q. * * * Now, do you know Rooney McInereny?

A. I know him well.

Q. Former Justice of the Supreme Court of Oklahoma?

A. Yes.

Q. Represented Mr. Mooney, did he not?

A. Yes. * * *

* * *

Q. Are you telling this Court that after Mr. McInereny had his client enter a plea of guilty, that he then allowed him to perjure himself?

A. I don't think he did it intentionally. [Emphasis supplied]

On summation, the prosecutor told the jury, R. XII-2187, 2188:

> Let's say something about Kevin Mooney. Kevin Mooney was up to his ears in this thing and he was caught and he made a full and clean breast of it, a full statement and breast of it all and did his very best to make it right. Hall wants to make him a conspirator. But if you believe that Kevin Mooney is a conspirator in this case, you have to believe that his lawyer, a distinguished former member of the Supreme Court, persuaded or allowed, deliberately, his client not only to lie but to plead guilty to a felony and suffer all of the consequences that a felony conviction imposes when he didn't do it. There isn't a lawyer anywhere that can

> talk a client into doing that. *I submit to you, Kevin Mooney's testimony is tested by the fire of his plea of guilty and by these obvious questions: Why should he lie? Why should he hold back anything from you? What does he have to gain by making false statements and perjuring himself from the witness stand? That only leads to another felony conviction. He had nothing to gain. He came in here and told, he bared his soul and he told it all.* And I'm anxious to hear how Mr. Thomas is going to fit him into this conspiracy. [Emphasis supplied]

According to the court reporter's transcript, the district court charged the jury, R. XII-2271:

> The plea of guilty of a Co-defendant who is alleged to be an accomplice with the Defendants on trial in the commission of certain by the jury as evidence of the guilt of the Defendants on trial as they stand charged herein and gives rise to no inference against the Defendants on trial.

Whether garbled or not, this instruction, couched only in generalities, can hardly be considered curative in view of the intensity and unrestrained forcefulness with which the prosecutor pressed Mooney's plea of guilty on the jury, and the uses to which he put it. Clearly, it was not sufficiently direct or specific to offset or negate the undue prejudice to petitioner which must necessarily have resulted from the prosecutor's conduct. By affirming, the court below has so far sanctioned a departure by the district court, from accepted procedures for assuring the fairness of trials in accordance with the Fifth Amendment, as to call for an exercise of this Court's power of supervision.

Conclusion

For all the foregoing reasons hereinabove set forth, this petition should be granted, and a writ of certiorari should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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